

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of |) | |
| |) | |
| Revision of Procedures Governing Amendments |) | MB Docket No. 05-210 |
| to FM Table of Allotments and Changes |) | RM-10960 |
| of Community of License in the Radio |) | |
| Broadcast Services |) | |

To: The Commission

**COMMENTS OF ARLINGTON CAPITAL PARTNERS, L.P. AND
ARLINGTON CAPITAL PARTNERS II, L.P.**

1. Arlington Capital Partners, L.P. and its affiliate, Arlington Capital Partners II, L.P. (collectively "Arlington"), by their attorneys, hereby submit these comments in response to the Commission's Notice of Proposed Rule Making ("NPRM") in the above-captioned proceeding. Arlington is an investor in three radio broadcast companies: Cherry Creek Radio LLC, Main Line Broadcasting, LLC and Long Island Radio LLC (the "Arlington Companies"). The Arlington Companies collectively own 42 broadcast stations and are programming an additional four stations pursuant to a local marketing agreement pending FCC consent to the acquisition of those stations. The Arlington Companies have filed, or would like to file, applications to improve the service areas for some of their FM stations. However, the Arlington Companies have been precluded from filing some applications by regulatory obstacles that are outdated and no longer necessary to achieve the goals of Section 307(b) of the Communications Act of 1934, as amended, or other public interest objectives. Accordingly, Arlington is an interested party to this proceeding and urges the Commission to modify Section 73.208(a)(2) of its rules to simplify and expedite the process of securing authorizations to improve FM broadcast facilities.

2. Section 73.208(a)(2) has been an obstacle to certain proposed upgrades by the Arlington Companies. Section 73.208(a)(2) currently requires every FM allotment to have a reference point that meets three requirements: (a) minimum separation requirements, (b) minimum field strength requirements over the community of license, and (c) availability for actual construction – even if the applicant does not intend to construct the station at the proposed reference point. Requirements (a) and (b) continue to serve the public interest. Requirement (a) permits the Commission to retain the ability to use simple computer programs and calculations to determine whether an allotment should be made and to define a simple parameter that constitutes a fixed degree of protection from interference to which a station is entitled.¹ Requirement (b) also is important in ensuring that a station will provide an adequate signal to the community to which the Commission has allotted the channel. However, requirement (c) – the availability of a reference point site that is actually available for construction – no longer serves a useful purpose because it precludes maximum efficiency in use of the FM spectrum. Arlington believes it is in the public interest to require a fully-spaced reference point to exist, but that an applicant should not be required to demonstrate that construction is physically possible at the reference point site.

3. The reference point site availability requirement serves two purposes: “[a] It eliminates the need for Commission and staff effort in dealing with rulemaking requests which will prove unusable if the assignment is made; and [b] it avoids cluttering the table with assignments which, unusable themselves, nonetheless prevent the making of other assignments as long as they are there.” *Bayshore*, n.1 *supra*, par. 15.

4. The first purpose – to avoid administratively burdening the Commission with processing allotment requests without knowing that they can be built out – is well illustrated by *San Clemente, CA*, 3 FCC Rcd 6728 (1988) and 10 FCC Rcd 8291 (1995), where the

¹ See *Bayshore, NY*, 20 FCC 2d 988, 18 RR 2d 1510, par. 8 (1970).

Commission went back and forth refusing to allot a channel where there was no available site, then allotting it because a site seemed available, and then withdrawing the allotment when no usable site was available. However, the problem of an allotment being unusable if there is no actual site availability at the reference point has been obviated by subsequent regulatory developments. With respect to upgrades for existing stations, the risk of an unusable allotment has disappeared because stations are permitted to file one-step upgrade applications on the same channel or a mutually exclusive channel as minor change applications without submission of a separate petition for rulemaking.² An actual operating site must be specified when an application is filed. It may be a fully-spaced site, or it may be a non-fully spaced site that qualifies under the equivalent protection provisions of Section 73.215 of the Commission's rules. In either case, the station is upgraded and the Table of Allotments is modified only if the application for construction permit is granted. Thus an actually available site must exist in order for the upgrade to take place. Accordingly, the requirement that a reference point be actually available no longer serves the purpose for which it was intended – i.e., to ensure that the allotment is in fact used.

5. Similarly, if the Commission adopts its proposal in the NPRM to require that all petitions for rulemaking seeking to add new or non-mutually exclusive channels or to change the community of license of a channel be accompanied by an application for construction permit, then an actually available site will be established for all proposed allotments. Even for allotments proposed under Section 73.215 there will be a usable site, and the allotment will be requested by a party that presents a plan to use it. If the application is defective and is dismissed or denied, the allotment will not be made, so there will not be a situation where an allotment is made but remains unused for lack of an available site. Consequently, a reference point is needed

² See Section 73.3573(a)(1) of the Rules.

as a basis for mileage separation calculations by other stations, but this site need not be suitable for construction to ensure that the allotment is used.

6. The second purpose underlying Section 73.208(a)(2) – to avoid preclusion of other potential allotments by an allotment that is not used – is also outdated. The concept of avoiding preclusion of other potential allotment proposals is obsolete. It was adopted 38 years ago.³ It was eliminated 23 years ago, on the ground that, “[b]ased on the maturation of the FM medium . . . our preclusion policy . . . is no longer necessary to hold channels in reserve awaiting development of the medium.”⁴ The fair and efficient distribution test of Section 307(b) remains in effect to ensure that allotments are not all clustered in the largest markets, but the Commission found long ago that enough allotments have been made throughout the country that the public interest no longer calls for denying allotment petitions in order to preserve options for future allotments.

7. Since both original purposes behind requirement (c) are no longer valid, Arlington submits that the requirement that a reference point be an actually buildable site should be repealed. This requirement no longer fulfills its original purposes and conflicts with the fundamental Commission objective of maximizing spectrum efficiency. For example, in *Bayshore*, the Commission noted that if Channel 276A were not allotted as requested, it could never be used anywhere in the Long Island, NY area. Similarly, there are other situations where stations have not been able to upgrade because a reference point that meets all required mileage separations of Section 73.207 exists, but that point may be in a body of water, on a military reservation or in a park or residential area where tower construction is prohibited. The reference

³ See *Policy To Govern Requests for Additional FM Assignments* (Public Notice FCC 67-577), 9 RR 2d 1245, 1246 (1967).

⁴ See *FM Assignment Policies and Procedures* (BC Docket No. 80-130), 90 FCC 2d 99, 51 RR 2d 807, at par. 15 (1982).

point is perfectly viable for purposes of computerized databases to determine spacing to co-channel and adjacent-channel stations, so the coordinates are suitable for the Table of Allotments. However, tower construction at that point may not be feasible, so the station may be upgraded only as a Section 73.215 station. And, if a Section 73.215 upgrade is not permitted, then the station is artificially confined to a lower class and lower power level, reducing the number of people it can serve, which is less a efficient use of the spectrum than if the upgrade were permitted.

8. The Commission already encourages one-step upgrades through Section 73.3573(a)(1) and the proposals in the NPRM – proposals that Arlington supports. The Commission can further improve FM service by removing that portion of Section 73.208(a)(2) whose purpose has been fulfilled and will continue to be fulfilled by other Commission policies and procedures. Arlington urges the Commission to modify Section 73.208(a)(2) by changing the phrase “transmitter site is available” in the first sentence to “reference point is available,” eliminating the second sentence, and substituting “reference points “ for “transmitter sites” in the third sentence. Arlington further proposes adding a sentence to this Section to ensure that the proposed station can actually be constructed. Accordingly, Arlington proposes that Section 73.208(a)(2) read:

When the distance between communities is calculated using community reference points and it does not meet the minimum separation requirements of §73.207, the channel may still be allotted if a *reference point* is available that would meet the minimum separation requirements and still permit the proposed station to meet the minimum field strength requirements of §73.315. [Second sentence deleted.] In cases where a station is not authorized in a community or communities and the proposed channel cannot meet the separation requirement a showing should also be made indicating adequate distance between suitable *reference points* for all communities. *If the reference point is not suitable for construction, the allotment will be made only if a construction permit is simultaneously granted for a station that is authorized to utilize the allotment at a usable location other than the reference point.*

Respectfully submitted,

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